

This appeal is only concerned with Docket No. 159,369, date of accident of June 20, 1991. The sole issue is whether the respondent sustained its burden of proving that the Kansas Workers Compensation Fund (Fund) should be liable for all the workers compensation benefits paid in this case. The Administrative Law Judge found in favor of the respondent and assessed all of the award against the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the whole record and hearing the arguments of the parties, the Appeals Board finds as follows:

The claimant made claim for two (2) accidental injuries while employed by the respondent. The first accident occurred on April 5, 1991, and the second one occurred on June 20, 1991. Claimant was employed by the respondent performing work as a helper loading trucks, warehouse man, and packer. Claimant first injured his low back on April 5, 1991, while lifting at work. Claimant was initially treated by Broadway Occupational Medicine and then was referred to Robert Eyster, M.D., an orthopedic surgeon in Wichita, Kansas, who first saw him on May 1, 1991. Dr. Eyster diagnosed lower back strain with possible mild disc bulging at L4-5. Claimant received treatment in the form of an S1 joint injection, physical therapy and extension exercises. He was released to return to work on June 12, 1991, with no restrictions nor impairment rating. Claimant had no prior history of low back problems before this incident.

Respondent placed the claimant back to work as a packer because he had been off work for such a long period of time. Respondent was eventually going to move the claimant back to loading and working as a warehouse man. Michael Hundley, safety director and freight dispatcher for the respondent, testified that he did not consider the claimant at this time to be handicapped because the doctor released him without restrictions and indicated that he could do the other jobs. Claimant, however, again left work on June 20, 1991, with increased symptomatology and has not returned to work for the respondent.

Claimant settled his claims against respondent on September 30, 1993, receiving a compromise settlement of \$100 for the April 5, 1991 accident and \$7,250 for the June 20, 1991 accident. All issues between the respondent and the Kansas Workers Compensation Fund were reserved for further determination. The Administrative Law Judge found that the respondent had knowingly retained a handicapped employee and that the June 20, 1991 injury would not have occurred but for the April 5, 1991 injury.

In a workers compensation case, in order to shift liability to the Fund, the respondent has the burden to first prove that it knowingly employed or retained a handicapped employee. See K.S.A. 1990 Supp. 44-567(a). An employee is considered handicapped if he or she is afflicted with any impairment that would constitute a handicap in obtaining or retaining employment. See K.S.A. 44-566(b).

Claimant's treating physician, Dr. Robert Eyster, was the only physician to testify in this matter. On direct examination, Dr. Eyster, while being questioned by the respondent, testified that if the claimant would not have been injured on April 5, 1991, he would not

have received his second injury, "a but for situation." However, on cross-examination by the Fund, Dr. Eyster testified that the claimant was released on June 12, 1991, after the first accident, with no permanent impairment and no restrictions.

Accordingly, the Appeals Board finds, from the testimony of Michael Hundley and Dr. Eyster, that after the first accident the respondent did not know the claimant had a pre-existing impairment which was of such character that it constituted a handicap. Claimant was released by Dr. Eyster to return to work with no permanent impairment rating and without permanent restrictions. The respondent knew that the claimant had hurt his back, but did not know that he had suffered permanent impairment of such a character that it constituted a handicap in obtaining or retaining employment. See Hinton v. S. S. Kresge Co., 3 Kan. App. 2d 29, 592 P.2d 471 (1978), rev. denied 225 Kan. 844 (1979).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated April 22, 1994, should be, and hereby is, reversed and the respondent is ordered to pay one hundred percent (100%) of all workers compensation benefits and costs accrued in regard to Docket No. 159,369, with date of accident of June 20, 1991. Other findings and orders of the Administrative Law Judge are otherwise affirmed and hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tamara Pistotnik, Wichita, KS
Stephen P. Doherty, Kansas City, KS
J. Philip Davidson, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director